

UNITED STATES DISTRICT COURT
 WESTERN DISTRICT OF WASHINGTON
 AT SEATTLE

DENG M. KUMDAK,)	CASE NO. C07-1210-BHS-MAT
)	
Petitioner,)	
)	
v.)	ORDER TO SHOW CAUSE
)	
KENNETH QUINN,)	
)	
Respondent.)	
_____)	

This is a federal habeas action brought pursuant to 28 U.S.C. § 2254. Petitioner filed his federal habeas petition in August 2007 together with a request to stay the petition pending exhaustion of issues which had yet to be presented to the state courts. After obtaining a response to petitioner's request to stay the proceedings, the Honorable Monica J. Benton, United States Magistrate Judge, denied petitioner's request on the grounds that petitioner had not shown good cause for his failure to first exhaust his unexhausted claims in the state courts. Judge Benton also noted that petitioner was likely to be time-barred from returning to the state courts to exhaust his unexhausted claims.

Petitioner subsequently sought reconsideration of Judge Benton's Order denying his

01 request to stay the proceedings. Petitioner identified in his motion for reconsideration a number
02 of “new facts” including that: (1) petitioner had filed a motion for equitable tolling of RCW
03 10.73.090's one-year time limit in the Washington Court of Appeals; (2) petitioner had obtained
04 documentation supporting his allegations that he had no access to his legal papers from February
05 6, 2007, to July 17, 2007; and, (3) petitioner had recently filed his state personal restraint petition
06 containing his unexhausted claims. Petitioner also presented additional argument addressing the
07 issue of equitable tolling in the state court collateral review process.

08 Judge Benton denied petitioner’s motion for reconsideration, explaining that motion that,
09 with the possible exception of the fact that petitioner filed his personal restraint petition in the state
10 courts in early October 2007, the new facts offered by petitioner in his motion for reconsideration
11 could have been brought to the attention of the Court earlier through the exercise of reasonable
12 diligence. Judge Benton further explained that the fact that petitioner had filed his personal
13 restraint petition did not alter her conclusion that the state courts were likely to find the petition
14 time-barred. With respect to petitioner’s argument regarding equitable tolling, Judge Benton
15 concluded that it could have been brought to the attention of the Court earlier and that, in any
16 event, the new argument did not persuade her that the requested stay was warranted.

17 At the direction of Judge Benton, respondent filed an answer to petitioner’s federal habeas
18 petition in which he argues that the petition was a mixed one and that, under the circumstances
19 of this case, petitioner should be given the option to dismiss his unexhausted claims and proceed
20 with his exhausted claims. Petitioner, in his traverse to respondent’s answer, argues that given
21 Judge Benton’s previous rulings that he is likely time-barred from returning to the state courts to
22 exhaust his unexhausted claims, his claims should be deemed procedurally barred and should be

01 considered together with his exhausted claims because he can show cause for his procedural
02 default and resulting prejudice.

03 After reviewing the briefs of the parties, this Court reviewed the Washington Court of
04 Appeals docket for petitioner's pending personal restraint petition to determine the status of those
05 proceedings.¹ That docket appears to reflect that the Washington Department of Corrections has
06 been directed to respond to petitioner's arguments regarding equitable tolling of the Washington
07 statute of limitations applicable to personal restraint petitions, RCW 10.73.090, and that a
08 response to petitioner's personal restraint petition is due by April 15, 2008. Though the state
09 courts may yet determine that petitioner's personal restraint petition is time-barred, no such
10 determination has been made at this juncture. Should the state courts determine that petitioner
11 is entitled to equitable tolling of the limitations period, and that he is entitled to relief on any of
12 the claims presented in his personal restraint petition, such determinations would likely render the
13 pending federal habeas action moot.

14 Accordingly, this Court does hereby ORDER as follows:

15 (1) The parties are directed to SHOW CAUSE, not later than *April 10, 2008*, why this
16 action should not be stayed pending resolution of petitioner's personal restraint petition in the state
17 courts.

18 (2) Petitioner's federal habeas petition (Dkt. No. 4) is STRICKEN from the Court's
19 motion calendar to be re-noted, if necessary, at a later date.

20 (3) The Clerk is directed to send copies of this Order to petitioner, to counsel for
21

22 ¹ This action was reassigned to this Court on March 11, 2008. (Dkt. No. 23.)

01 respondent, and to the Honorable Benjamin H. Settle.

02 DATED this 24th day of March, 2008.

03 

04 Mary Alice Theiler
05 United States Magistrate Judge
06
07
08
09
10
11
12
13
14
15
16
17
18
19
20
21
22